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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 209

UNITED STATES, PETITIONER,

v.

JOHN STUART KELLY, ET AL., RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (R. 22-37) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 1, 1951 (R. 37-38). Petitioner invokes jurisdiction of this Court under 28 U. S. C. § 1255(1).

QUESTION PRESENTED

Whether hourly rate employees of the Government Printing Office were entitled to holiday pay under the Joint Resolution of June 29, 1938, whenever they were required to work on a holiday occurring on a regular work day.

STATUTES AND CONTRACT PROVISION INVOLVED

1. Joint Resolution of April 16, 1880, No. 22, 21 Stat. 304. This Joint Resolution provided:

> Employees of the Government Printing Office shall be allowed the following legal holidays with pay, to wit: the 1st day of January, the 22d day of February, the 4th day of July, the 25th day of December, and such days as may be designated by the President of the United States as a day of public fast or thanksgiving: *Provided* that the said employees shall be paid for these holidays only when the employees of the other government departments shall be so paid. * * *.

2. Joint Resolution of January 6, 1885, No. 5, 23 Stat. 516, as amended by the Joint Resolution of February 23, 1887, No. 6, 24 Stat. 644. This Joint Resolution provides:

> The employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The 1st day of January, the 22d day of February, the day of each year which is celebrated as "Memorial" or "Decoration Day", the 4th day of July, the 25th day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days.

3. Act of January 12, 1895, c. 23, § 46, 28 Stat. 607, 44 U. S. C. § 44. This Act provides:

> The employees of the Government Printing Office shall be allowed the following legal holidays with pay, to wit: The 1st day of January, the 22d day of Febru-

ary, the 4th day of July, the 25th day of December, Inauguration Day, Memorial Day, Labor's Holiday, and such day as may be designated by the President of the United States as a day of public fast or thanksgiving.

4. The Joint Resolution of June 29, 1938, c. 818, 52 Stat. 1247, 5 U. S. C. § 86a. Section 1 of the Joint Resolution provides:

> Whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day or any other day declared a holiday by Federal statute or Executive Order, or any other day on which the departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

5. The pertinent section of the holiday rate provision of the wage agreement of October 27, 1924, which was in effect at all times material hereto follows:

> *Holiday Rate.* Employees required to work on a legal holiday or a special holiday declared by Executive Order shall be paid at the day rate plus 50 per cent for all the time actually employed in addition to their gratuity pay for the holiday as provided by law;
> * * *

STATEMENT

This case was presented to the United States Court of Claims upon a stipulation of facts agreed to by counsel for plaintiffs and defendant. Although the stipulation in this case pertained only to the claim of plaintiff John Stuart Kelly, hereafter referred to as Kelly, the questions of law and fact are common to all plaintiffs in this action (R. 5).

The Public Printer regularly employed Kelly as a journeyman printer in Washington, D. C., from September 1, 1943, to October 15, 1945 (R. 6). Kelly's compensation was fixed by a wage agreement negotiated by the Public Printer and a committee of employees representing the journeyman printers of the Government Printing Office (R. 6).[1] Kelly was required to and did work 8 hours on each of the following holidays (R. 7):

September 6, 1943	Labor Day
November 11, 1943	Armistice Day
November 25, 1943	Thanksgiving Day
February 22, 1944	Washington's Birthday
May 30, 1944	Memorial Day
July 4, 1944	Fourth of July
September 4, 1944	Labor Day
November 23, 1944	Thanksgiving Day
January 1, 1945	New Year's Day
February 22, 1945	Washington's Birthday

For work performed on each of the above holidays, Kelly received only the same rate of pay as for work performed on an ordinary eight hour day, including the night differential when applicable (R. 7-8).

On April 23, 1948, Kelly submitted a claim to the Acting Public Printer requesting additional compensation for hours he was required to work on the above holidays in accordance with the holiday rate provision of the wage agreement. Thereafter, this claim was forwarded to the Comptroller General's office (R. 8). On March 28, 1949, the Comptroller-General in an "obviously surprising" decision denied Kelly's claim and ruled that he was only

[1] The Joint Committee on Printing created by the Act of January 12, 1895, 28 Stat. 601, 44 U. S. C. § 1, consists of three members of the Senate and three members of the House of Representatives. The wage agreement of October 27, 1924, which included the holiday rate provision set out above, was entered into and approved by the Joint Committee on Printing under the authority of and pursuant to the Act of June 7, 1924, 43 Stat. 658, 44 U. S. C. § 40.

entitled to receive "exactly the same pay as those who were not required to work." (R. 30).

Kelly's suit in the court below was based upon two separate and distinct claims. One claim was for the payment of premium pay for hours of work performed on statutory holidays in accordance with the wage agreement of October 27, 1924. Although Petitioner contended below that § 23 of the Act of March 28, 1934,[2] prohibited the payment of premium pay for work on holidays falling within the regular forty-hour work week, it now concedes that Kelly is entitled to such premium pay (Pet. Br. 10). The second claim was for statutory holiday pay in accordance with the Joint Resolution of June 29, 1938, and the Act of January 12, 1895, *supra*, pp. 2-3. With respect to this claim, Petitioner contended that the Joint Resolution of June 29, 1938, eliminated the legal basis for the payment of holiday pay when Kelly was required to work on statutory holidays.

The court below rendered judgment in favor of Kelly on both claims. The court unanimously agreed that Kelly was entitled to premium pay for hours worked on holidays in accordance with the wage agreement of October 27, 1924. Two judges dissented from the majority opinion awarding Kelly holiday pay when he was required to work on statutory holidays. However, even the dissenting opinion conceded that "It seems inequitable that an employee who does not work on a holiday should receive a full day's pay, whereas an employee who is required to work shall be paid only time and a half, or 50 per cent more than is received by the one who does not work; * * *." (R. 36).

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[2] Act of March 28, 1934, c. 102, Title II, § 23, 48 Stat. 522, 5 U. S. C. § 673c.

ARGUMENT

I. Wage Rate Employees of the Government Printing Office Who Are Required to Work on Statutory Holidays Occurring on Regular Work Days Are Entitled to Holiday Pay.

The Joint Resolution of June 29, 1938, provides holiday pay "whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis [3] are relieved or prevented from working solely because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, * * *." Petitioner contends that the literal words of the Joint Resolution of June 29, 1938, deprived Kelly of his holiday pay when he was required to work on one of the designated statutory holidays because he was not "relieved or prevented from working solely because of the occurrence of a holiday." The court below rejected Petitioner's contention on the basis of prior judicial decisions, the legislative history of the Joint Resolution of June 29, 1938, and the traditional policy of the Government with respect to similar holiday pay statutes in *pari materia*.

A. The limitation in the Joint Resolution of June 29, 1938, is solely for the purpose of eliminating holiday pay for holidays which occur on nonwork days.

The Joint Resolution of June 29, 1938, was enacted to correct an injustice to wage rate employees which grew out of an Executive Order, dated December 6, 1937, excusing federal employees from duty on December 24, 1937.[4] Since the Executive Order failed to provide pay for the holiday, wage rate employees lost their wages for the day (R. 19). To remedy this situation, Mr. Ramspeck intro-

[3] The term "wage rate" employees, as used in this brief, includes per diem, per hour and piecework employees.

[4] Executive Order No. 7763, dated December 6, 1937; see H. R. Rep. No. 2683 (1938), 75th Cong., 3d Sess. (R. 19).

duced a resolution[5] in the House of Representatives, providing compensation for such employees who were excused from duty on that day. This resolution was referred to the Committee on Civil Service which recommended a substitute resolution ultimately enacted by Congress (R. 29). Petitioner's brief creates the misimpression that the original resolution was amended because "the language of the Resolution as introduced was not broad enough to eliminate * * * preferential treatment" accorded wage rate employees (Pet. Br. 13). However, the Committee Report, as well as both the majority (R. 29, 30) and the dissenting (R. 36) opinions of the court below unequivocally demonstrate that the actual reason for the amendment was that holiday pay for Executive Order holidays presented a recurring problem which should be solved by "a permanent law to take care of such similar situations that may arise in the future."[6]

At the same time that Congress undertook to extend and enlarge the holiday benefits of wage rate employees[7], it also eliminated the right of such employees to holiday pay for holidays occurring on nonwork days which they had received under interpretations of prior holiday statutes. As the court below found, Congress selected apt words to accomplish this single limitation (R. 30). Petitioner seeks, without basis, to extend the scope of the limitation to deprive Kelly of his holiday benefits which wage rate employees had enjoyed for over 55 years.[8] The court below pointed out:

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[5] H. J. Res. 551, introduced on January 5, 1938; 75th Cong., 3d Sess. (1938).

[6] Committee Report No. 2683, to H. J. Res. 551, 75th Cong., 3d Sess. (1938).

[7] The Joint Resolution of June 29, 1938, increased the number of paid holidays and provided holiday pay for many groups of wage rate employees not previously entitled to such pay.

[8] Petitioner's brief refers to a letter from the Acting Comptroller General to the Secretary of the Navy, reprinted in the report of the House Committee on Civil Service, in support of its position. The

> The Civil Service Commission and the House Committee in enlarging the scope of the resolution obviously had noted the Comptroller General's comment, quoted in the committee report, that the existing legislation had been so interpreted as to give employees pay for a holiday coming on a day when they would not have worked anyway. To prevent that unduly generous treatment, the language "whenever * * * employees * * * are relieved or prevented from working solely because of the occurrence of a holiday" was inserted. The words were apt for that purpose. * * * They had a purpose and were, for that purpose well chosen. We are asked only to hold that they should not be given an additional application, which, taken literally, they could receive, when all the indications are that they were not meant to have it. (R. 30-31).

Although wage rate employees are no longer entitled to holiday pay for holidays occurring on a nonwork day, it is clear that they are entitled to such pay when they are required to work on a holiday occurring on a regular work day. "The evil which Congress meant to cure by the words it used, it cured. The additional effect contended for by the Government would destroy a practice which no one had ever even intimated to be an evil, and which responsible officials had, for more than forty years, regarded as just and necessary." (R. 31).

The unwarranted limitation of traditional holiday benefits which Petitioner seeks to attribute to the Joint Resolution of June 29, 1938, moved the court below to make the following comment:

> It is completely unthinkable that the owner of a printing shop could, by practice, or by contract, maintain the policy as to holiday pay which the Government

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passage cited refers to "double compensation for the [holi]day if work is performed thereon." This passage wholly fails to support Petitioner's position since it only refers to compensation for holidays which occur on nonwork days. Admittedly, Congress intended to, and did in fact alter this situation.

here seeks to attribute to Congress. Such an employer, might, and many employers did, in 1938, have a policy of not paying for holidays not worked. If the holiday was worked, it was paid for. Some such employers then, and most of them now have contracts with their employees providing for paid holidays, but in all such contracts there is a provision that if the holiday is in fact worked, it will be paid for again, usually at premium pay, and in addition to the holiday pay. But in no case which we have heard of, or can imagine, could an employer maintain a practice whereby an employee who worked on a holiday received merely the same pay as one who did not work. (R. 31).[9]

The decision below is consistent with the settled rule that where a literal interpretation of a statute leads to harsh or inequitable results,[10] the court will "resort to the policy" of the law "to ameliorate its seeming harshness or to qualify its apparent absolutes * * *." *Markham v. Cabell*, 326 U. S. 404, 409 (1945).

B. The legislative history of the Joint Resolution of June 29, 1938, demonstrates that its purpose was to broaden the scope of previous holiday pay statutes.

Petitioner contends that the purpose and background of the Joint Resolution of June 29, 1938, support its position that holiday pay is limited to holidays when wage-rate employees are not required to work (Pet. Br. 10). There is

[9] Traditionally, wage rates and working conditions of Government Printing Office employees have been comparable to those prevailing in private industry. See Act of January 13, 1883, c. 23, 22 Stat. 402.

[10] The absurd and inequitable consequences of Petitioner's literal interpretation of the Joint Resolution of June 29, 1938, are revealed in decisions of the Comptroller General. For example, in decision A-97265 (August 29, 1938) the Comptroller General held that unless an employee is in fact, ready, willing, and able to go to work on a statutory holiday, he is not entitled to holiday pay under the Joint Resolution of June 29, 1938, despite the fact that his department did not work on that day.

not a shred of evidence in the legislative history of the Joint Resolution of June 29, 1938, which remotely indicates an intent to deprive wage rate employees of their traditional holiday pay which they received when they were required to work on a holiday. The court below pointed out:

> One has immediate doubts as to whether Congress, in 1938, intended to take away from this class of Government employees these rights which they had enjoyed at least since 1895. And when one examines the origin and purpose of the legislation, he finds not the remotest intimation of any such intent. (R. 30).

Contrary to Petitioner's contention, the legislative history of the Joint Resolution of June 29, 1938, clearly demonstrates that Congress intended to improve substantially the holiday status of wage rate employees,[11] characterized by Mr. Ramspeck on the floor of the House during passage of the Joint Resolution, as "the lowest-paid group of employees in the Government service." 83 Cong. Rec. 9466 (1938).

Petitioner argues that the Joint Resolution of June 29, 1938, "carried out the intent of the original resolution and made it plain that per diem employees were entitled to gratuity pay only when they did not work on a holiday." (Pet. Br. 14). Petitioner's failure to designate which reso-

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[11] H. R. Rep. No. 2683, 75th Cong., 3d Sess. 2 (1938) contains a letter from Harry B. Mitchell, President of the Civil Service Commission to Congressman Ramspeck which states: "It is believed that the President had in view that the benefits of the holiday be accorded to all classes of employees to the greatest extent possible. The accounting authorities, however, have held that in the absence of specific legislation the regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis lose pay for that day. This has resulted in discrimination against these groups of Federal employees * * *" (R. 20).

lution it deems the "original resolution" [12] is immaterial, since none of the prior holiday statutes support Petitioner's construction of the Joint Resolution of June 29, 1938. The Joint Resolution of April 16, 1880, which "allowed" Government Printing Office employees designated statutory holidays with pay contained the proviso that they should "be paid for these holidays only when the employees of the other Government departments shall be so paid." The court below pointed out that this proviso was interpreted to limit holiday pay to a holiday which "fell on a day which would otherwise have been a working day." [13] (R. 27). In any event the Joint Resolution of January 6, 1885, and the Act of January 12, 1895, *supra*, pp. 2-3, did not contain provisos limiting holiday pay to holidays occurring on regular work days.

None of the holiday statutes prior to June 29, 1938, in *haec verba*, specifically granted employees the right to holiday pay whenever they were required to work on one of the designated holidays. They merely "allowed" [14] wage rate employees designated holidays with pay. Nevertheless, such employees who were required to work on statutory holidays were entitled to holiday pay in addition to regular pay for the day's work. This practice was consistently followed by the Government for over 55 years

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[12] Although Petitioner apparently considers the Joint Resolution of April 16, 1880, to be the "original resolution", (Pet. Br. 11, 14) it relies upon and quotes the language of the dissenting opinion (Pet. Br. 14) which designates the Joint Resolution of January 6, 1885, as the "original resolution." (R. 36).

[13] See 1 Comp. Gen. Treas. 31 (1880).

[14] Fifty years ago, it was established that a wage rate employee who was "allowed" a holiday under the Act of January 12, 1895, was automatically relieved and prevented from working except when the exigencies of the situation required his services on such day. It is clear that the phrase "relieved and prevented" in the Joint Resolution of June 29, 1938, is equivalent to the term "allow" in prior holiday statutes. See 8 Comp. Gen. Treas. 322 (1901).

and was affirmed several times by the Comptroller General of the Treasury [15] and the United States Court of Claims.[16] The consistent background of legislative policy and administrative practice [17] prior to 1938 demonstrates unequivocally that Congress intended the Joint Resolution of June 29, 1938, to continue the traditional practice of paying wage rate employees holiday pay whenever they worked on a statutory holiday occurring on a regular work day.

C. The Comptroller General's interpretation of the Joint Resolution of June 29, 1938, is entitled to no weight.

The Comptroller General's interpretation of the literal words of the Joint Resolution of June 29, 1938, limits holiday pay to wage rate employees when they are absent from work solely because of the occurrence of a holiday.[18] Petitioner argues that this interpretation is entitled to great weight as an administrative construction which should not be overturned unless it is "clearly wrong, or unless a different construction is plainly required." (Pet. Br. 15). As a technical matter it is never possible for the occurrence of a holiday to be the "sole" cause for excusing employees from working on such a day. It is the executive head of a department who relieves or prevents the employees from

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[15] 8 Comp. Gen. Treas. 322 (1901); 13 Comp. Gen. Treas. 40 (1906); See also 3 Dec. C. G. 411 (1924).

[16] In Emmett L. Adams v. The United States, 42 C. Cls. 191, 212 (1907), it was pointed out that:

> "* * * when the statute declares certain days to be holidays and provides that certain employees shall receive the same pay as on other days, they are thereby exempt from work, with pay, on such days. That being so, to require them to work on such days at their ordinary rate of pay would be depriving them of the benefit of such statute."

[17] United States v. Missouri Pacific Railroad Company, 278 U. S. 269 (1929).

[18] 18 Comp. Gen. 1; 18 Comp. Gen. 186; 18 Comp. Gen. 191.

working on the holiday,[19] not the mere occurrence of the holiday. Thus it is necessary that there be a concurrence of a designated holiday with some affirmative or negative expression from the executive head of the department relieving and preventing the employees from working on such day. It is clear that the Comptroller General's literal construction renders the Joint Resolution of June 29, 1938, a nullity. Since it is presumed that Congress would not enact a statute which would be utterly ineffective, such construction is entitled to no weight and was rejected by the court below as clearly wrong. Cf. *Oates* v. *First Nat. Bank*, 100 U. S. 239 (1879).

In any event, the Comptroller General's construction is entitled to little weight in the absence of reliance thereon by the public. Sutherland, *Statutory Construction*, Vol. 2, 3rd ed. (1943) 520. In the instant case such requisite reliance by the public was not present. Finally, since the Comptroller General's interpretation of the Joint Resolution of June 29, 1938, is inconsistent with long settled administrative and judical construction of holiday statutes applicable to wage rate employees, it should be ignored.

D. Congress did not intend the Joint Resolution of June 29, 1938, to deprive wage rate employees of holiday benefits in order to equalize the holiday status of wage rate and per annum employees.

Petitioner's suggestion that Congress intended to deprive wage rate employees of long standing holiday benefits in order to eliminate discrimination against per annum employees (Pet. Br. 11) is wholly without basis. Petitioner argues that wage rate employees are placed "in a superior status expressly denied to per annum employees." (Pet.

[19] The executive heads of Government departments have the authority to require employees to work on holidays. See Act of Mar. 3, 1893, c. 211, § 5, 27 Stat. 715, 5 U. S. C. § 29.

Br. 17). The court below disposed of this unfounded argument with the following language:

> The Government suggests that the fact that per annum employees at that time, received no extra pay when they were required to work on a holiday was a discrimination, which the Government's interpretation would eliminate. But that difference had existed for some forty-five years, no mention had been made of it in connection with this legislation, and there is no basis whatever for thinking that Congress intended to treat it. It was apparently, a recognized difference between the status of a per annum employee with his relatively secure tenure, and a per diem craftsman. (R. 31).

The distinction between the methods of compensating per annum employees and wage rate employees has existed for many generations. The United States Civil Service Commission has pointed out that per annum employees were paid for every day of the year including work days and nonwork days. They receive their regular pay each pay period, regardless of Saturdays, Sundays or holidays on which they are excused from working.[20] (Pet. Br. 11). On the other hand, wage rate employees are not paid for Saturdays or Sundays, unless they are required to work on such days. The holiday pay which they receive for a limited number of holidays is provided by statute. It is apparent that if any discrimination exists, it is in favor of per annum employees. Thus, there is not even a remote basis upon which to ground an assumption that Congress intended the Joint Resolution of June 29, 1938, to remedy

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[20] *Digest of Provisions of Law Fixing Pay For Employees in the Executive Branch of the Federal Government*, at p. 93. Under the War Overtime Pay Act of 1943, providing extra compensation for per annum employees who were required to work overtime, the extra compensation was computed on the basis of straight time hourly rates which were derived by dividing the per annum rates by 2,880 (360 x 8). This was on the principle that a per annum rate was basic payment for 360 days of 8 hours each.

a discrimination *against per annum employees*. Indeed, Petitioner's construction of the Joint Resolution of June 29, 1938, would deprive wage rate employees of holiday benefits which per annum employees presently receive. Per annum employees required to work on a holiday designated by statute now receive double compensation for the day.[21]

Petitioner contends further that Section 2 of the Joint Resolution of June 29, 1938,[22] supports its view that Congress intended to equalize the holiday-pay status of wage rate and per annum employees. There is no merit to this contention[23] since Section 2 repeals prior holiday statutes only to the extent that they are inconsistent or in conflict with the Joint Resolution. Since prior holiday statutes create and allow the holidays referred to in the Joint Resolution of June 29, 1938, it is clear that they must be read in *pari materia*. In *Di Benedetto* v. *United States*, 108 C. Cls. 18, 24, 25 (1947), *cert. denied* 332 U. S. 763, it was recognized that the Joint Resolution of June 29, 1938, did not repeal, but merely modified the Joint Resolution of January 6, 1885.

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[21] Act of June 30, 1945, c. 212, Title III § 302, 59 Stat. 298, as amended May 24, 1946, c. 270, § 11, 60 Stat. 218, 5 U. S. C. § 922.

[22] Section 2 of the Joint Resolution of June 29, 1938, provides: "The Joint Resolution of January 6, 1885, U. S. C., Title 5, sec. 86, and all other laws inconsistent or in conflict with the provisions of this act are hereby repealed to the extent of such inconsistency or conflict."

[23] The court below disposed of Petitioner's contention as follows: "* * * we do not agree with the Government's argument that the repealer provision of the 1938 Resolution, in some way not quite clear to us, supports the Government's interpretation of the Resolution." (R. 32).

II. The Government Policy of Working Employees on Holidays During the War Period Did Not Prohibit the Payment of Holiday Pay to Wage Rate Employees Who Were Required to Work on Statutory Holidays.

Petitioner claims that the court below overlooked a memorandum dated May 12, 1943, which was sent to the heads of executive departments and agencies by W. H. McReynolds, Administrative Assistant to the President, declaring the wartime need for maximum output in all Government activities (Pet. Br. 16).[24] Despite the fact that Petitioner failed to mention the memorandum in its brief or argument in the court below, it now relies for the first time upon the memorandum to support its construction of the Joint Resolution of June 29, 1938. The memorandum requested the heads of executive departments and agencies to require federal employees to work on all days normally observed as holidays with the exception of Christmas. It was completely silent with respect to holiday pay for employees who worked on such days. On December 17, 1943, a similar memorandum[25] was sent to heads of executive departments and agencies.[26] This memorandum contained the observation "that holiday work is performed by Federal employees without addi-

[24] The memorandum of May 12, 1943, referred to by Petitioner as a "Presidential Directive" was merely a circular letter sent out over the signature of W. H. McReynolds, Administrative Assistant to the President, to the heads of executive departments and agencies, at the direction of the President.

[25] The memorandum of December 17, 1943, was also sent out over the signature of W. H. McReynolds.

[26] Neither memorandum was published in the Federal Register. There is nothing in the record, nor is there any other evidence which indicates that this or the May 12, 1943, memorandum was sent to the Public Printer, who is the head of an Independent Establishment as distinct from an Executive Department or Agency. See United States v. Allison, 91 U. S. 303 (1876), re status of Government Printing Office.

tional compensation." (Pet. Br. 5) This comment obviously referred to the holiday pay status of per annum employees.[27] It did not and could not refer to wage rate employees, because their holiday benefits were granted by statute. Petitioner's own citation to the *Digest of Provisions of Law Fixing Pay For Employees in the Executive Branches of the Federal Government*, March, 1945, at p. 94 confirms this distinction between the holiday pay status of per annum and wage rate employees. It is highly significant that the sole reference to McReynolds' memorandum is in a footnote to a summary of holiday provisions relating to per annum employees. A separate section of the same *Digest*, at p. 96, which lists statutory holiday provisions for wage rate employees, makes no reference to McReynolds' memoranda.

In *Di Benedetto* v. *United States, supra*, at p. 24, the distinction between the holiday pay status of per annum and wage rate employees was brought into sharp focus. Although the court denied holiday pay to *per annum* employees in that case, it clearly indicated that if the holiday statutes applicable to wage rate employees had also been applicable to per annum employees, they would have been entitled to holiday pay. The court pointed out, in that case, that "this legislation[28] has not, of course, any direct application to the plaintiff, who is paid on a per annum basis, since it is limited to per diem employees."

Petitioner does not rely upon McReynolds' memoranda as a bar to payment of holiday pay for work on statutory holidays. It merely invokes the memoranda to support its

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[27] The Act of March 3, 1893, as amended by the Act of March 15, 1898, 5 U. S. C. § 29, gave discretion to the heads of executive departments and agencies to require per annum employees to work on days normally observed as holidays, and required that such additional work must be without additional compensation.

[28] Joint Resolution of January 6, 1885, as modified by the Joint Resolution of June 29, 1938.

construction of the Joint Resolution of June 29, 1938.[29] Its contention that the Joint Resolution of June 29, 1938, should be construed in the light of an unrelated wartime policy promulgated five years later, is a novel theory unsupported by logic or precedent.

Finally, the *Di Benedetto* case *supra*,[30] as well as a decision of the Comptroller General of the United States, establishes that McReynolds' memoranda did not prohibit the payment of holiday pay to wage rate employees required to work on statutory holidays. The Comptroller General, in 22 C. G. 1059, pointed out:

> Presidential or administrative orders requiring work on legal holidays during the war emergency do not and cannot change the status of such holidays for the purpose of applying statutes and regulations having the force and effect of law granting rights and benefits on the basis of the holidays.

REASONS FOR DENYING THE WRIT

A. The Decision Below is Clearly Correct.

The decision of the court below holding that Kelly is entitled to holiday pay for designated statutory holidays when he was required to work on such days is clearly correct. It effectuates the intent of Congress and is consistent with the traditional administrative and judicial interpretations of holiday statutes providing holiday benefits for wage rate employees. Finally, the decision is so

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[29] Petitioner concedes that plaintiffs are entitled to premium wage rates for holidays in accordance with the wage agreement of October 27, 1924 (Pet. Br. 10). Thus, it is clear that Petitioner does not contend that the wartime policy of working on holidays, in and of itself, prohibits payment of more than a regular day's pay to wage rate employees required to work on a holiday.

[30] The Government's Brief in Opposition to the Petition for a Writ of Certiorari in the *Di Benedetto* case, emphasized that the holiday statutes involved herein were not applicable to per annum employees, as distinct from wage rate employees.

firmly grounded on principles of equity that even the dissenting opinion of the court below, upon which Petitioner relies, concedes that Petitioner's construction of the Joint Resolution of June 29, 1938, is inequitable. (R. 36). The court below characterized Petitioner's construction of the Joint Resolution of June 29, 1938, as an effort "to attribute to Congress an intention which it is morally certain Congress did not have * * *." (R. 31). Thus, it is apparent that there is neither a sound legal nor an equitable basis to warrant review of the decision by this Court.

B. There is No Showing That the Decision Below is of Substantial Public Importance.

Petitioner's suggestion that the decision of the court below will impose a heavy financial, administrative, and litigation burden upon the Government (Pet. Br. 9, 17) is without merit. If any litigation burden results, it is obvious that it would be a self-imposed burden. The clear-cut principles established by the decision below will determine the rights of all plaintiffs herein. Thus, no further litigation will be necessary after this Court's disposition of the instant case.

Petitioner's claim that the Government will be saddled with a heavy administrative burden as a result of the decision below is without basis. Petitioner concedes that plaintiffs are entitled to premium pay for hours worked on the same holidays involved herein in accordance with the wage agreement. (Pet. Br. 10). Precisely the same wage data which is necessary to compute the amount of such claims will yield the data required to compute the amounts due for the statutory holiday pay. Thus, it is apparent that no additional clerical burden will be imposed upon the Government other than that which it already is obligated to assume.

Petitioner's argument that the decision below will impose a heavy financial burden upon the Government is wholly unsupported. Petitioner claims that since the date

of the decision below, 1807 additional claims were filed for extra pay for holiday work. There is no showing that such claimants are wage rate employees entitled to statutory holiday pay under the principles established by the decision of the court below. Nor is there any evidence that the holiday benefits of such claimants were governed by a wage agreement similar to the one in the instant case.

Further, Petitioner's suggestion that "the implications of the decision below may extend" to many other Government employees not covered by the wage agreement of October 27, 1924 (Pet. Br. 18) is sheer conjecture as to a remote possibility. There is nothing in the record, nor does Petitioner offer any evidence, which suggests that the decision of the court below is applicable to such employees. In any event, the applicable six year statute of limitations in the Court of Claims will effectively bar the institution of suit in that court by any employee not included in the instant case, since all holidays which are the basis of the suit below occurred more than six years ago.

CONCLUSION

For all of the reasons set forth in this brief, it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Claims should be denied.

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